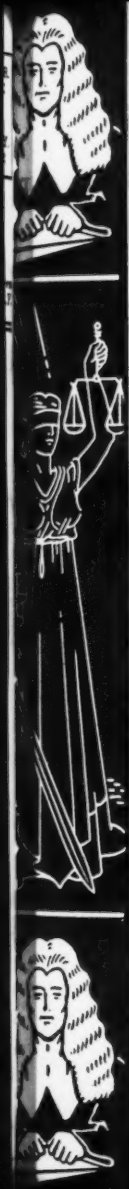

SEPTEMBER-OCTOBER 1952

Case *and* Comment

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IN THIS ISSUE

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The Mission of a Law Center

By Hon. Arthur T. Vanderbilt

Chief Justice, Supreme Court of New Jersey

Dean Emeritus, New York University School of Law

Condensed from New York University Law Review, January 1952

THE LEAST a law school should do for its students is to equip them to deal competently and in accordance with the traditions of a great profession with both the facts and the applicable law in the varied situations that they will handle in their offices and in the courtroom. They should also be made aware of their responsibilities to their profession, to the courts and to the public as molders of popular opinion and as prospective holders of important public offices. We do not have time in the law schools to educate our students in the humanities, the social sciences and the natural sciences or to train them in the arts of investigation, reasoning and expression, but clearly we must find time to cover the wide fields of legal learning which have been too long neglected by us. Procedure in the broad sense of judicial procedure has for the most part been deemed a fit subject for exploration only after admission to the bar, and then often at the client's expense.

Dean Pound has pointed out that both international law and civil law were part of the standard equipment of the average attorney of the age of Kent and Story. Today we live in a world where not only must lawyers master these subjects but where they must also learn how to study law generally from the comparative point of view. The lack of training in these vital fields of the law for at least three quarters of a century has had its inevitable effect on the work of lawyers in the courtroom, on the thinking of lawyers in public service and on our international relations generally. Manifestly the first function of a law center is to study the many problems of legal education systematically and with imagination to the end that the undergraduate instruction of a law school and the college teaching that precedes it may become really effective.

Much progress has been made in the law within the last hundred years, very largely as the result of the study and teaching of a relatively few men in the law schools. But notwithstanding all of this fine work the developments in natural science, technology and mass production, in transportation and communication, yes, even in the arts of false propaganda,

have far outstripped the law. This lag in the law has forced us into an era of executive justice developed through countless administrative agencies, many of which would have been unnecessary had the law and the courts kept pace with the times. The results are dangerous to our traditional freedoms and our established form of government.

It should be frankly recognized that no law school can hope in the three years at its disposal for undergraduate instruction to teach a student all that he will need to know for life as an enlightened member of the legal profession. The second function of a law center should therefore be to do everything in its power by post-graduate instruction to improve the efficiency of the active members of the bar. This may be done by graduate courses of study, by occasional conferences and by periodicals and other publications. Lawyers must learn to come back to school just as doctors, dentists and engineers do. A law center should develop graduate courses in all of the specialties in which practising lawyers are interested as well as in subjects that make for their greater cultural enlightenment.

Every law center should also aid the practicing lawyer by taking cognizance of current developments in the law and holding conferences at which groups of distinguished experts present their views to lawyers and laymen, and wherever possible the proceedings of these conferences should be published for the benefit of the entire profession. For many years New York University has held annually three or four such conferences on topics ranging from War Contracts, Pension Funds, A Unified Transportation System and An Accessions Tax, to centennial celebrations, last year in honor of David Dudley Field and this year in honor of James Madison. A series of lectures on The Social Meaning of Legal Concepts, started in 1948, has become an annual event, dealing with such topics as Inheritance of Property and the Power of Testamentary Disposition, Criminal Guilt, and The Powers and Duties of a Corporate Management.

Publications are likewise a responsibility of a law center for keeping the practitioner periodically informed of developments in the law. We have tried to do our part in this field. In addition to the New York University Law Review we have the Annual Survey of American Law, now in its ninth volume, which furnishes the easiest means I know of for a lawyer to keep abreast of developments each year in every branch of the law. The Annual Survey of New York Law has inspired similar publications in New Jersey and California for the benefit of the bench and bar in each of those states. Our Tax Law Review, I am told, has the largest paid circulation of any law review in the country, and three years ago the Law School took over the publication of the Judicial Administration Series for the National

Conference of Judicial Councils. It seems clear to me that such graduate instruction, conferences and publications are the responsibility of every law center.

A law center should also be a vital force in the improvement of judicial administration. I should say without hesitation that the most pressing problem for improvement in the law today is removal of the just complaints of the people as to the operation of the law. Fortunately, these complaints center not on the substantive law, but on the unnecessary delays in the courts and the practice of deciding cases on technicalities of pleading and procedure rather than on the merits. Particularly must we take notice that rightly or wrongly, as a recent poll shows, 28% of the people believe their local judges are not honest. Respect for law cannot exist in such circumstances. Accordingly we are organizing an Institute of Judicial Administration with a distinguished governing board. I hope that many of the members of the legal profession will be interested in participating in the work of the Institute. There is nothing more important that a lawyer can do today than to improve our procedure and our judicial administration.

Closely related to these problems is the breakdown in the enforcement of the criminal law. The sensational has been brought to light by the Kefauver and O'Connor Committees, but equally crucial is the collapse in the ordinary day-by-day operation of the criminal law. If you wish to investigate this subject in your own county, just check the percentage of indictments against crimes committed, of trials against indictments, and of convictions against trials. Then check further the percentage of rehabilitations as against the number of convictions, and judge for yourself whether or not the criminal law is functioning well in your own community. I will be much surprised if such basic statistics are even available in your locality, but if they are available, you will be appalled at what they show.

All of these are important, very important, activities of a law center, but a law center has a still more fundamental and transcendent mission—the modernization of the law.

Today the law is in grave danger of collapsing from its own weight. In the United States we find ourselves confronted not with one jurisdiction but with 49, not with the 5000 decisions of Coke's day or the 10,000 of Mansfield's, Kent's and Story's, but with more than 2,000,000. Our legislative output is equally staggering; to the 274 volumes of codes, revisions and compiled statutes in 1947 there must be added in the last two bienniums 136,894 pages of new statutes. We have no guide whatever to these statutes on a national basis comparable to what we have in the digests of judicial decisions. Indeed, a lawyer does well to know the statute law of his own state. No one can

even pretend to know the statute law of the country or what is good or bad in each jurisdiction. Of our municipal ordinances need I say more than that the volumes in which they are printed go unread. And indeed in many places they are not even printed. Our administrative regulations and decisions are in large part either never published or else published at such a late date as not to be of real use. Thus, large bodies of the law by which we are governed are utterly unknown, and the law generally is beyond the grasp of any man or small group of men to master as Coke and the great men of the revolutionary era did the law of their times. Considering all that the law is called upon to do, the marvel is that it has done as well as it has.

Only in law centers in great law schools can the work of modernizing the law be undertaken. With 49 jurisdictions to be dealt with, efforts to restate or modernize any part of our law must be great cooperative efforts. The work of modernization must be handled in law centers on a cooperative basis, with law professors working with experienced judges, legislators, practicing lawyers, business executives, and labor leaders. And the work of every law center should be exposed to the widest possible criticism and comment, not only of the legal profession, but of all interested laymen.

Much depends on the spirit with which the work is undertaken and the point of view that is consistently maintained throughout the task. The most interesting commentary on our profession that I have ever read comes from the pen of H. G. Wells (in his book, The Work, Wealth and Happiness of Mankind):

"When every iniquity of the lawyers of the past has been admitted, we still find that there were abundant gentlemen of the long robe, haunted, even if they were not inspired and pervaded, by the spirit of righteousness. The illumination they shed may not always have been a beacon, but at any rate the wick never ceased altogether to glow, and down the centuries we see a succession of these unloved men boring away in their tedious frowsty courts, really struggling in that dim mediaeval light to import some semblance of justice, some thought for the commonweal, into the limitless greed of robber barons, the unqualified imperatives of feudal chiefs and the grasping cunning of the baser sort."

Wells goes on to state that the great work of the legal profession is the exact definition of proprietary rights. While I concede the importance of this aspect of the work of the legal profession, it seems to me that historically its primary mission has been and at the present moment is to preserve individual freedom—freedom of thought and action—to the fullest extent possible consistent with the public welfare. The modernization of the law, its adaptation

to the need of our times, must be thought through in terms of freedom if we are to get the greatest good out of the potentialities of every individual. It is only within recent years that we have had occasion to think of freedom except in terms of peace. Now we have to consider freedom in terms of cold war, preparation for actual war, war itself, recovery from war and the emergencies attendant on war, among them the emergency of inflation which may be the cause of our losing all of our freedoms. Even the Constitution must be restudied in terms of these basic realities, with which we apparently have to live for years to come. The preservation of freedom is very obviously, it seems to me, the central problem of our law today and around it the separate study of individual subjects in the law must necessarily revolve.

The study of freedom, again, cannot be the work of any one law center, nor can any one law center undertake to study all of the law and to restate it in terms of present-day needs. One of the first tasks of those interested in seeing law centers such as ours fulfil their responsibilities in this field will be to convince the great foundations, men of wealth and the large corporations of the high desirability of investing some of their funds in research in law. Some two billion dollars is spent on scientific research in this country every year. In view of the results obtained it is obviously money very well spent. I urge the high desirability of spending on legal research, say, one cent on every dollar spent in other research. You may call it the premium on an insurance policy of doubtful utility or you may even be pessimistic enough to call it simply alms for oblivion, but there is no gainsaying the fact that all of the scientific research in the world will do us little good if our government, our laws and our respect for law break down. The call is clear for every judge, every lawyer, every law professor and every good citizen to do his part in adapting our complicated system of law to the needs of the times, our best hope for safeguarding and enlarging the sphere of human freedom under law.

What Did He Mean?

The newly elected Circuit Solicitor was very young and very earnest. Some effort had been made by the attorney for the defendant to discredit the pretty prosecutrix.

"Look at her," the earnest young Solicitor shouted in his argument to the jury, "counsel for the defense tries to make a point of the fact that she is well dressed. Of course she is well dressed, now that she has left her father's home and is hustling for herself!"

One fleeting grin in the jury box, and eleven impassive faces.—Contributed by Bernice Youngblood, Court Reporter, Circuit Court of Walker County, Alabama.

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The Origin of Arbitration

By FRANCES KELLOR

First Vice President, American Arbitration Association

Extracted from a report on Arbitration and the Legal Profession prepared for The Survey of the Legal Profession

JOHN MONTGOMERIE BELL (in his Treatise on the Law of Arbitration in Scotland) is of the opinion that the origin of arbitration was of an earlier date than the regular establishment of public courts and that arbitration in fact took its rise in the very infancy of society. He says: "Whenever any parties had a dispute respecting the right to a valuable subject which from their equal strength of the competitors, or from other causes it was inconvenient to settle by mere appeal to force and violence, but which nevertheless required to be brought to a settlement, nothing seems more likely than they should bethink themselves of the expedient of referring the question to some mutual friend or neutral third party as umpire between them and agreeing to abide by his decision." This in essence is natural arbitration by the free will of the parties in controversy without benefit of legal aid.

It is not, however, from scattered instances in different countries that American arbitration derives its inheritance, but rather from voluntary mercantile arbitration of a non-legal character. The general use of arbitration seems to have been due to commercial expansion and to the peculiarity of early trading conditions, as found in the guild system and trade fairs of England.

Prior to the industrial revolution in England in 1760 crafts were carried on by master workmen in their homes. Apprentices and often even journeymen resided there. When the apprentice became a journeyman, he frequently married into the master's family or at least lived with or near him. There developed a personal and trade loyalty to the establishment and home in which the apprenticeship was served. As a consequence, the ordinances of craft guilds—including those applicable to early arbitration of discords—covered not only those questions which related to the craft itself, but also to the regulation of the daily lives of and the relationship between the masters and their families, servants, journeymen and apprentices. The guilds jealously guarded their powers of enforcing their decrees and awards. After providing for arbitration before the wardens the ordinance of the Worshipful Company of Grocers, organized in 134[illegible] and second in importance only to the Livery Companies of London, provided: "And if by chance one party be unwilling to abide by their direc-

tions and complain to other officers, all who shall be warned of the Fraternity shall go with the wardens in order to oppose him, except in cases of felony or other action amenable to the law."

The trade fairs also made their own unique contribution to the development of early mercantile arbitration. Many early merchants were itinerant peddlers who carried their goods from fair to fair, traveling together for protection. The fairs were held at various times in countryside towns. They were the occasion upon which the people did their trading for a period of several months and since they lasted but a few days, it was essential that if a dispute arose it be settled quickly.

Some of the chief features of the great trade fairs included the following: the Peace of God or of the Church; and freedom of the international merchants from local laws. It was provided—at first by the feudal lord, subsequently by the Church, and sometimes by treaty—that there should be peace and comity at the fairs (the Peace of God) even if some of the nations whose nationals were involved were at war. The laws of the state or of the locality did not prevail as between the international merchants

themselves, but only the Law Merchant which grew out of the settlement of disputes at fairs. Disputes between English and foreign merchants were governed by the rules of the fair. There was strict extraterritoriality at each fair, and the merchants settled their disputes before their own courts before they journeyed to the next fair.

As England became an international commercial center, arbitration usage increased. Illustrative of this trend was the fact that as early as the 14th century aldermen were deputed to act as arbitrators in disputes to which Hanseatic merchants residing in England were parties.

The essential features of natural or free will arbitration as applied at trade fairs and in guilds were that disputes were settled by trade experts, under trade rules and through trade machinery, immediately upon their emergence, according to the customs of the trade, and that faith or, when possible, upon group or trade discipline for observance of their decisions. Finality and expediency in making decisions were outstanding characteristics of this type of arbitration as being necessary to the trading conditions of that time.

The time and precise manner in which law and free will arbitration became identified are obscure. We know that out of the trade fairs and guild systems of England there developed principles and standards that came to be known as the Law Merchant and through its practice they settled into precedents and prerogatives which the courts perpetuated, thus creating the common law.

We know that English courts were without authority over arbitration until Parliament began passing regulations, the application and interpretation of which eventually gave rise to what became known as common law arbitration. The purposes of these regulations were: 1) to protect the merchants against certain abuses growing out of their voluntary or free will system; 2) to encourage arbitration by creating stability or standards through decisions that constituted precedents; and 3) to retain the power of settlement within the courts and arrest the growth of arbitration as a rival power to litigation.

But statutory encouragement to arbitration (in England) appears to have grown out of a desire to promote trade, and to render the awards of arbitrators more effectual for the final determination of all controversies referred to arbitration by merchants and traders. In 1698, by Act of 9 & 10, Wm. III, c. 15, it was made lawful for all parties having a dispute, for which there was no other remedy but by personal action or a suit in equity, to agree that their submission be made a rule of court, and when an affidavit thereof was entered as of record, that the parties submit to and be bound by the arbitration. In case any party refused or neglected to perform or execute the arbitration, he was subject to penalty for contempt

of court, and process issued thereon unless it was made to appear to the court that the arbitrators misbehaved or the award was procured by corruption or undue means. Thus appeared at an early date the idea of protecting the trader against the arbitrator of his choice.

While the process of recording the submission as a rule of the court does not appear to have been either burdensome or expensive and was intended to give stability to awards, the effect of this law appears to have been to bring arbitration within the control of the courts and to give them occasion to set aside awards. Furthermore, either party could revoke the authority of the arbitrator at any time before the award was made. In order to correct the abuses and delays that grew up under this statute, the Act of 3 and 4 Wm. IV, c. 42 sec 39 was passed after the lapse of nearly a century and a half. This Act provided that neither party could revoke the authority of the arbitrator without leave of the court. It appears that the courts exercised sparingly their power to revoke such authority.

Later legislation went much farther in imposing compulsory reference to arbitration upon parties where the matter in dispute consisted of matters which could not be conveniently tried in any other way. It also gave power to the courts to appoint arbitrators and to remedy other procedural defects.

While these regulations were primarily intended to safeguard or improve the procedure, such was the jealousy of the courts in the desire to retain jurisdiction over the settlement of all disputes and to oppose any ousting of their assumed powers, that they sometimes infringed upon the prerogatives of the arbitrators to make a final and binding decision, and upon the rights of parties to conduct the arbitration in their own voluntary way.

It is difficult to realize that the English Kings first became interested in the courts as a source of revenue. Desiring fees, they reached out until they completely controlled the courts. The King's Courts and their lawyers wanted no rivals. It was inevitable that they objected to arbitration, simply because it was a rival. After a few decisions were rendered adverse to arbitration, they amounted to a precedent. In commenting upon an early case in which the rights of the court to set aside an award on its merits was questioned, Francis Russell (in his A Treatise on the Power and Duty of an Arbitrator) states: "The restriction imposed by the language of the act has subsequently been much disregarded, for the courts will listen to applications to set aside awards under the statute on other grounds than the two enumerated in the section." The two grounds enumerated were misbehavior or corruption in the arbitrator.

The assumption of these powers by the court did not, however, destroy or retard natural or free will arbitra-

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tion. As a matter of fact, the litigation involved in obtaining legal assistance often proved a handicap and there grew up in England as successors to the guilds a network of trade associations and commodity exchanges which carried forward natural arbitration under trade discipline, with but little resort to legal enforcement. Under the beneficent administration of these exchanges, London became the arbitration center of the world for international trade.

In the meantime, the identification of law with voluntary arbitration was in evidence elsewhere. As society came to be governed more generally by law, it was inevitable that arbitration should be included within it as a voluntary process, but subject to legal procedures, among them the granting of the basic right by law to arbitrate. For example, Demosthenes quotes the Athenian law in his pleading against Medius, as follows: "If parties have a dispute with each other respecting their private obligations and desire to choose an arbitrator be it lawful for them to select whosoever they will. But when they have mutually selected an arbitrator, let them stand fast by his decision and by no means carry an appeal from him to another tribunal but let the arbitrator's sentence be supreme." Thus the principles of mutuality and finality were carried into legal arbitrations.

The forbears of American arbitration are the mercantile and the legal systems of England. They have been inherited, one by way of mercantile and trade organizations and practices, carrying forward the voluntary free will tradition; the other, by way of court decisions establishing the common law, and later the statutory laws of the various states in the United States. The two procedures have advanced side by side and have been neatly dovetailed so that now where one system fails, the other takes up the slack.

How a Lawyer Charges for His Services

A client, having received a bill from his lawyer and thinking it quite exorbitant, called the lawyer. One item of $20 was not itemized and he demanded to know what that was for. "For waking up at 2:00 a. m. and thinking about your case," replied the lawyer.—Carl B. Everberg in Commercial Law Journal.

AMERICAN BAR ASSOCIATION SECTION

The publishers of Case and Comment donate this space to the American Bar Association to permit it to bring to our readers matters which the Association deems to be of interest and practical help to the general practitioner.

THE State Bar Associations of Colorado, Idaho, Montana, Oregon, Utah and Wyoming cooperated with the American Bar Association in the arrangements for the ABA Yellowstone Park Regional Meeting at the Canyon Hotel and Lodge June 17 to 20. Nearly 500 lawyers from these six states, and some from Washington, a great many of whom were accompanied by their wives and children, joined in this memorable occasion in the midst of the scenic splendors and natural wonders of Yellowstone National Park.

In the opening Assembly Tuesday afternoon those in attendance were welcomed by President Ernest A. Peterson of the Montana Bar Association, President A. Sherman Christenson of the Utah State Bar and Governor Frank A. Barett of Wyoming That evening the Montana Bar Association and the Bars of Bozeman and Livingston, Montana, sponsored a reception in honor of President Barkdull.

The Assembly the next morning heard John D. Randall of Cedar Rapids, Iowa, on "Unauthorized Practice of the Law"; Theodore Voorhees, Philadelphia, on "Lawyer Referral Service"; Herbert W. Clark, San Francisco, reporting on "Survey of the Legal Profession"; Martin J. Dinkelspiel, San Francisco, on "Uniform Commercial Code" and Edward B. Love, ABA Director of Activities, who spoke on "Membership". The principal address was by President ABA Howard L. Barkdull on "The Responsibilities of the Organized Bar." That afternoon the Workshops began with Alan Loth on "Drafting Legal Papers"; James L. Shepherd, Jr., of Houston, on "Oil and Gas Leasehold and Other Mineral Estates" and Judge James Alger Fee, of Portland, on "Procedures Before Trial". These were followed that afternoon by the Panel of John L. J. Hart, Denver, Owen G. Reichman, Salt Lake City, Thomas P. Patterson, Helena, and Paris Martin, Boise, on "Lifetime and Testamentary Estate Planning" and by a Panel of Philip S. Van Cise, Denver, William Langroise, Boise, William Meyer, Butte, Brigham E. Roberts, Salt Lake City, and John P. Ilsley, Gillette, with Herbert W. Clark, San Francisco, as moderator, on "Trial Tactics." That day's Assembly was sponsored by the Section of Judicial Administration. The principal address was by Chief Justice J. E. Hickman,

of the Supreme Court of Texas, on "As Others See Us."

Thursday morning the Institutes resumed with Thomas S. Edmonds, Chicago, on "Death Provisions in Partnership Agreements" and a Panel including Laurens Williams, Omaha, and T. M. Ingersoll, Cedar Rapids, on "Income Tax Problems of Farmers and Ranchers." The other two Institutes resumed later in the morning with Ross L. Maline, Jr., Roswell, New Mexico, on "Leasing of Public Lands" and Clarence E. Hinkle, of Roswell, on "Unitization", in the Oil and Gas program. The Trial Tactics Panel, also completed its Institute. After luncheon, there was a meeting sponsored by the Section of International and Comparative Law and the Junior Bar Conference which heard the ABA President-Nominate, Robert G. Storey, of Dallas, on "Growing Importance of International Law." A World Affairs program followed which heard Mrs. Joan Rosanove, a barrister of Melbourne, Australia, on "The Practicing Australian Lawyer", followed by a major address on "Victory Through Law", by Henry R. Luce, Editor and Publisher of *Time, Life* and *Fortune*. The Assembly that evening heard Honorable Campbell C. McLaurin, Chief Justice of the Supreme Court of Alberta, Calgary, Canada, on "American-Canadian Understanding."

On Friday, the Oil and Gas Institute resumed with J. M. Jessen, Los Angeles, speaking on "Placer Mining Claims Located Subsequent to the Leasing Act of 1920 as Affecting Oil and Gas." The Section of Judicial Administration, meeting jointly with the Conference of Bar Activities and the Junior Bar Conference, heard Paul De Witt, New York, discuss "How Not to Achieve Judicial Reform" and considered local programs for carrying out the six-point program of the Judicial Administration Section. The Regional Meeting concluded with a joint session of the Taxation and the Oil and Gas Institutes at which J. Paul Jackson of Dallas spoke on "Tax Problems in Oil and Gas Properties." The balance of Friday was devoted to the Annual Meeting and General Assembly of the Utah Bar members.

For the lawyers and their families there were lectures by the Park naturalists, dancing every evening, fishing and trips by horseback and motor to see canyons, waterfalls, and Old Faithful, among other various kinds of geysers.

Lawyer and Doctor

A physician and a lawyer were discussing the disparity in the ethics of their professions. The lawyer contended that his work was just as honorable as that of the physician. Retorted the man of medicine: "Nonsense, whoever saw two doctors beating their chests, pounding their fists on the table and shouting to the high heavens in hot argumentation, whether to kill the patient or save his life?"—Arkansas Baptist.

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Nonrecognition of Gain on Sale of Personal Residence

By MAURICE T. BRUNNER
Of the Rochester, New York Bar
Member of Editorial Staff
The Lawyers Co-operative Publishing Company
Former Editor-in-Chief, Bureau of Analysis

TAXPAYERS have long complained of the injustice of the federal income tax statutes which rendered them taxable on any gain realized upon sale or exchange of their personal residences but did not allow them to deduct any loss incurred upon any such transaction. This inequity has now been relieved to some extent in certain situations. Loss on sale or exchange of a home is still non-deductible but tax on any gain involved in a sale or exchange may be deferred or entirely avoided if certain conditions are met.

Section 318 of the 1951 Revenue Act added subsection (n) to section 112 of the Internal Revenue Code. This subsection provides that any gain on sale of a taxpayer's principal residence shall be recognized only to the extent that the selling price exceeds the cost of a new principal residence purchased and used as such within a period beginning a year before the sale and ending one year after the sale. The subsection attaches special meanings to the terms "sale" and "purchase" and provides for an adjustment to the cost basis of the new residence for the purpose of determining any gain or loss upon a later disposition of such residence, and also provides a special statute of limitations for assessing any deficiency of income tax due to a recognized gain arising out of a sale of a residence.

The conditions which must be met in order to receive the benefit of the statute are (1) the taxable year involved must end after December 31, 1950 and the "sale" must occur after that date; (2) the property "sold" must be the principal residence of the taxpayer; (3) the new property "purchased" must be acquired within the specified period and during that period used as the taxpayer's principal residence. If these conditions are met and the cost of the new residence equals or exceeds the selling price of the old residence, the transaction gives rise to no taxable gain. However, the benefit of the statute is limited generally to a single such transaction per year (not taxable year). If the cost of the new residence is less than the selling price of the old one, only the difference is recognized for the purpose of determining taxable gain

There is no requisite that in any sense the "sale" be a forced disposition.

The question of what constitutes a "principal residence" will undoubtedly be given attention in the regulations which will be issued. Manifestly, it does not include a summer cottage. However, the term is not limited to a dwelling house. The statute applies to a trailer or houseboat if it is actually used as the taxpayer's principal residence. (Report of the Senate Finance Committee on the Revenue Act of 1951, Internal Revenue Bulletin, CB 1951–2, p. 484.) The ownership of stock in a cooperative apartment corporation is treated as equivalent to ownership of a residence, provided the purchaser or seller of such stock uses as his principal residence the apartment which it entitles him to occupy. Where the taxpayer's residence is part

of a property also used for business purposes, as in the case of an apartment over a store building or a home on a farm, and the entire property is sold, the statute applies only to that part of the property used as a residence, including the environs and outbuildings relating to the dwelling but not to those relating to the business operations. (CB 1951–2, p. 484.) The taxpayer is not required to have actually been occupying his old residence on the date of sale. He may move into his new residence and rent the old one temporarily before its sale. He may also rent out his new residence temporarily before occupying it. (CB 1951–2, p. 483.) If a taxpayer purchases a home and then disposes of it before he sells the residence upon which he claims the benefit of the nonrecognition provisions of the statute, the purchased home will not be regarded as his "new residence". If more than one residence is purchased during the statutory period, only the last residence after the date of the sale of the old residence is considered the "new residence".

An exchange of a residence for other property is considered a sale, and the acquisition of a residence upon the exchange of property is considered as a purchase. Thus, it does not appear necessary for the proceeds of the sale of the residence to be used in the purchase of a new residence. If a taxpayer's residence is involuntarily converted, through destruction as by fire, by theft, or governmental seizure, such destruction, theft, or seizure is considered a sale; and if a residence is so converted into property, rather than insurance proceeds or damages, and such property is used as taxpayer's residence, such conversion is considered a purchase.

A residence any part of which was constructed or reconstructed by the taxpayer is considered as purchased by the taxpayer, but the cost of such purchase includes only so much as is attributable to the acquisition, construction, reconstruction, and improvements made which are properly chargeable to capital account during the period one year before and one year after the sale. Thus, a taxpayer can come within the statute if he sells his principal residence and modernizes, enlarges, or otherwise converts into his principal residence another house which he owns or acquires, but he may not offset against any gain anything that he put into such a house more than one year before the sale or after one year following the sale. Where a taxpayer constructs his new residence and he commences construc-

tion prior to the expiration of one year after the sale of his old residence, it is sufficient compliance with the statute if he occupies the house within 18 months after the sale, and in determining cost there are included capital expenditures made during the extended six months' period, and there are added another six months to the time during which only the last of several residences purchased will be considered the "new residence".

The statute applies with respect to only one sale or exchange per year, except when the taxpayer's new residence is "involuntarily converted" through fire, theft or condemnation. Any such involuntary conversion occurring within a year of the sale of the old residence is considered as taking place in the following year. (Cases within the new section will be governed thereby rather than by § 112(f) IRC.) However, the statute is not expressed in the form of an option and for any transaction within its terms the recognition of gain will probably be denied. Accordingly, in situations where it may be desirable to have gain recognized, as where there are offsetting capital losses, purchase of a new residence by the same taxpayer should be delayed beyond the term of the statute.

Special provision is made in the statute, to be enlarged upon by regulation, for situations under which the taxpayer and his spouse acting singly or jointly may obtain the benefits of the statute even though the spouse who sold the old residence was not the same as the one who purchased the new one, or the rights of the spouses in the new residence are not distributed in the same manner as their rights in the old residence.

The holding period of the new residence, for the purposes of determining long term capital gain, is the combined period of ownership of successive principal residences (CB 1951–2, p. 483), but the adjusted basis for gain on subsequent disposition of the new residence "as of any time following the sale of the old residence" is determined by deducting the amount of any gain not recognized on the sale of the old residence by reason of IRC § 112(n).

Because of the time lag allowed in determining whether or not gain is recognized, if a principal residence is sold at a gain the period for assessing any deficiency in tax as to such gain will not expire prior to three years after the taxpayer notifies the Commissioner either that he has purchased a new residence, or that he has not acquired or does not intend to acquire a new residence within the period prescribed in IRC § 112(n).

It may be noted that at the present writing the House has passed a bill favoring servicemen in regard to residence sales. It still has to be acted on by the Senate. The bill provides that active duty service will not be counted in determining the period within which sale and replacement of a residence must occur.

Rainy Friday in Harlem

By MORTIMER GETZELS
Of the New York Bar
Attorney-in-Charge, Harlem Office,
New York Legal Aid Society

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Reprinted from The Legal Aid Review, April 1952

IT IS traditional at the Main Office of the New York Legal Aid Society that Monday is like a madhouse and that by Friday it is quiet. And Friday with the help of bad weather is insurance for a waiting room of empty chairs. So the seasoned old-timers on the staff tell the new attorneys.

But the clients of the Harlem Branch are either unaware of this tradition or have no use for it. Monday through Friday they present themselves in consistent numbers, fair weather or foul. Sometimes it almost seems as though they save their troubles for a rainy day.

This is a personal account of a Friday at the Harlem Branch—a day of sleet and rain. It is offered as the record of a typical day. . . .

I arrive a few minutes after nine. The office is already open and five or six people are waiting. Our Secretary, Mrs. Erazo, is at her desk absorbed in typing index cards for yesterday's clients. I pass through the length of our space to my cubicle. As I take off my hat, coat and rubbers, from the window I watch my associate Manuel Graymore lock the door of his "Henry J." and pick his way across the street through the slush.

The morning's mail is on my desk. A letter to a prospective defendant returned by the Post Office marked "Removed, left no forwarding address." A card from the Clerk of the Surrogate's Court giving notice of an adoption hearing. A letter from the Government of Puerto Rico on one of Graymore's cases. An elegant circular, addressed to me, advertising choice Havana cigars for discriminating men at bargain prices. I wonder where they got my name. The Law Journal is still in its sodden wrapper. I open it and in the advance calendar for the Central Non-Jury Part search for one of my pending matters. Three hundred numbers behind. The trial is a good four weeks off.

Through the partition I can hear Graymore talking in Spanish to his first client of the day. I call Mrs. Erazo for dictation, and she surrenders the registration desk to the two Columbia law students who have just come in. We get down to work. I am finishing a letter to an attorney

Ten Promises of a Good Citizen

1. **I will vote at all elections.** I will inform myself on candidates and issues and will use my greatest influence to see that honest and capable officials are elected. I will accept public office when I can serve my community or my country thereby. (Note—In recent elections half of the eligible voters did not bother to vote for anyone!)
2. **I will serve on a jury** when asked.
3. **I will respect and obey the laws.** I will assist public officials in preventing crime and the courts in giving evidence.
4. **I will pay my taxes** understandingly (if not cheerfully) but will oppose unnecessary federal, state or local expenditures.
5. **I will work for peace** but will dutifully accept my responsibilities in time of war and will respect the flag of the United States of America.
6. In thought, expression and action; at home, at school and in all my contacts, **I will avoid any group prejudice** based on class, race or religion.
7. **I will support our system of free public education** by doing everything I can to improve the schools in my own community.
8. **I will try to make my community a better place in which to live.**
9. **I will practice and teach the principles of good citizenship** in my own home and in my other relationships.
10. **I will oppose those who seek gradually to destroy economic liberty** and convert our nation into a fascistic or socialistic state.

Shepard's Citations
Colorado Springs
Colorado

in Albuquerque, New Mexico, requesting a certified copy of a divorce decree when the telephone rings. Just an information call. In quick succession, I dictate a few demand notes on wage claims and several follow up letters. I return a signed stipulation of adjournment.

One of the law students sticks his head around the partition and holds up some cards: three more clients have been registered and are waiting. A few instructions to Mrs. Erazo about the correspondence, and then I am ready to see my first client.

It is a young woman, dark and smiling.

"Habla usted ingles?" I ask.

"A li'l bit".

She speaks enough English to tell me that she has been married nine years and has two children. Her husband left her three years ago, and although she does not know where he is, she is certain he is living with another woman. She wants a divorce. I explain the grounds while she nods and smiles. But first he must be located. She shrugs her shoulders. I tell her how the National Desertion Bureau can assist her. The smile returns. A telephone call to the Bureau, and an appointment for an interview is made. She is directed to return when her husband has been found.

The next client is a sharp-faced, elderly man. He is not sure what to do with his hat; first he deposits it in the file tray on my desk, then shifts it to his lap, drops it on a chair. He leans forward confidentially.

"It's the boys", he says hoarsely. "I can't get a nickel from them".

He is 70 years old, a furniture crater out of work. The "boys", his sons, are 40 and 45 and both are married. One is an accountant, the other is also a furniture crater. "I broke him into the trade myself". As he talks, he rubs his jaws (and with a thumb flicks at his nose, the only spot of color in his sallow face). He has received his last unemployment insurance check. His sons make good money, but they are refusing to help him. Why? He thinks. "It's the wife. They don't like the wife. She's my third".

I advise him of his right to social security benefits and refer him to the appropriate office to file an application. On the matter of support, I give him a card of introduction to the Family Court.

Before I can make my notations on his case, a woman rushes in with the law student in her wake, heaps on my desk a Municipal Court summons, a Marshal's notice of levy and sale, an account book, a handful of money order stubs, and bursts of speech. I stem the torrent and examine her papers. It is a claim on a balance due for goods sold. I ask questions. She has used the goods and made some payments. The summons for the balance was properly served weeks ago, but she was "too busy" to appear

in Court. The marshal threatens to descend on her house in two days.

"Please, please stop the marshal", she wails. "My husband gave me the money. He'll kill me if he finds out I didn't pay the store!"

While she fidgets and mutters that she has to get home to give her children lunch, I reach the marshal on the telephone. He is willing to accept $5.00 a week to hold off the sale. My client is only too happy to comply. Gathering up her papers, her shopping bag and her umbrella, she storms out as fast as she entered.

It's almost one o'clock. Three clients have taken up my entire morning. Graymore has seen twice as many. He comes in, wiping his hands. "Let's eat", he says. Mrs. Erazo is back from lunch, and miraculously the waiting room is empty. We can go together. We look out of the window. The sleet has changed to wind driven rain. We decide on the Royal across the street.

The restaurant is warm and reverberates to rhumba music. I order ropa vieja (literally, "old clothes", a stew of beef in strips, which turns out to be more appetizing than it sounds). "Dos cervezas!" Graymore shouts over the clamor of the juke box. The patron himself brings the beer and remains a minute to chat with Graymore in Spanish. Politely he includes me in the conversation with a few phrases in English. . . .

The waiting room is full again. Everyone must be seen.

First, I listen to a man who is being sued for a balance of $30.40 by a store which sold him a studio bed. On delivery, he found that it had only three legs. The store ignored his complaints. Naturally he didn't want to pay. I advise him to file an answer of breach of warranty and instruct him on how to prove his defense at the trial.

He is followed by a former employee of a public utility company who was laid off because of a lung condition. He now feels well enough after two years to return to work, but the company is unwilling to take him back. I suggest that he have a complete medical examination, and I promise that if he shows me a favorable physician's report I shall write to the employer and request his reinstatement.

The next two cases are matrimonial problems which I solve to the satisfaction of the clients with advice that is not altogether legal in nature. A client who has asked me to write to his sister-in-law in Kansas City demanding the deed to a lot he owns in Muskogee, Oklahoma, listens gravely to her offer to forward the deed if he will reimburse her for the $28.50 she has paid in back taxes for fourteen years. He authorizes me to accept. The purchaser of a used refrigerator which broke down after a week of operation comes in to tell me that as a result of my letter to the dealer the refrigerator has been repaired. In a long and exasperating telephone con-

versation, I manage to persuade a credit jewelry store to take back the watch that was foisted on my Puerto Rican client and to cancel a wage assignment. I refer a tenant who believes he is being overcharged to the State Rent Commission for a certificate of maximum rent.

One more case card remains on my desk. A moment to light a cigarette, and I go out to bring in the client. Putting in order my papers for a trial on Monday, I hear her tell me that an endowment policy on the life of her 21 year old son matured three months ago and the insurance company is still holding the check for $450. Her relief investigator has referred her to have a guardian appointed for the boy because he is unable to endorse the check.

"What do you mean you need a guardian? Can't he write?"

"You don't understand, mister. He can't walk or move or talk or anything. He's been like that since he was born."

The words are spoken in a matter of fact tone but they shake me from my preoccupation. I look up at a stolid woman with a round, olive-skinned face. Her hair is white.

"Where is he, in an institution?"

"No. I take care of him myself in the house. My husband was against him going to the hospital. . . . My husband, he died last year".

She talks a little about her son, without bitterness for his lot or self-pity for hers.

"He's in bed all the time. I gotta feed him and change him like a baby. He watches the television, though. He likes the wrestling and the fights. The Welfare is always bothering me about the television. Says we shouldn't have it even though we got it from before".

I already know that her chances of enjoying any benefit from the money are practically hopeless. If it is collected, the Department of Welfare will appropriate it. And before it can be collected, the law requires that her son be declared incompetent in a Supreme Court proceeding and that a committee be appointed. This involves impanelling a Sheriff's Jury, designating two psychiatrists to examine, and holding a formal hearing at a cost which would use up all of the fund in the first instance. I consult the Mental Hygiene Division of the Attorney-General's Office on the telephone. My opinion is confirmed. It would be best to leave the money with the insurance company until the boy dies.

Carefully I explain. She is really not disappointed.

"That's right, that's right", she sighs. "I'll bury him with the money. He ain't had much in his life, but I can give him a nice funeral when the time comes. Our people, we like a nice funeral". . . .

I'm tired. Thirteen or fourteen people have unloaded their troubles on me and I feel the effect of it. Today, of all days, I have to go to my Spanish class at the Association. I've

"I have no license—she does all the driving!"

also signed up for a tango course. Whoever talked me into taking tango lessons? My glance falls on the cigar advertisement. I snatch it, tear it and fling the pieces into the waste paper basket.

I stuff a file folder, a yellow pad and a copy of the State Rent Regulations into my brief case and dress to leave. Graymore is clearing his desk of books. "I've got to take off, Manny—school. Good night".

Outside it is raining gently. The wind has died down and it seems warmer. A woman passes me, pushing a carriage. The last client's words flash through my mind: "He's like a baby. . ." An image of a grown man motionless in bed, vacant eyed, not knowing the difference between life and death, yet waiting to die. The image fades, but suddenly I look forward to my tango lesson. I walk faster in the direction of the subway.

Contempt of Court?

The elderly practitioner who was arguing a case on appeal to the Tennessee Supreme Court was interrupted by the Chief Justice. "Colonel Jones, the court does not care to hear anything further on that proposition. We decided the point you are discussing in Smith v. Smith, and I assume that you are familiar with our holding in that case." "Oh, yes, Your Honors," Colonel Jones responded, "It's never any trouble for me to find out what Your Honors have decided, but God Almighty only knows what you will decide."—Richard N. Ivins in The Tennessee Law Review.

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Court Room Decorum

By JOSEPH H. HINSHAW
Of the Chicago Bar
Former President of the Illinois State Bar Association

Reprinted from the Illinois Bar Journal, November 1951

A STRONG desire for democracy has caused most Americans to resent a severe formality in any procedure. The reaction has been to deteriorate decorum in many of our courts, especially the lower courts; and to cause many laymen to lower their respect for both judges and lawyers. Even the "dusty foot" courts of England might not compare so unfavorably with some of our police courts.

It is difficult for a judge to change the conduct of the lawyers, because he also prefers to be democratic. For this reason many of our judges have refused to wear robes. The lawyers are his friends, and he is careful not to embarrass them by reprimands before their clients.

Every lawyer should remember that in deed and in fact he is an officer of the court, and that he has a direct duty to help look after it. He can do more even than the judge to maintain in the court room, a simple, yet respectful dignity. To this end may we not consider a few concrete suggestions?

When the judge enters the room, all should rise and wait to be invited to be seated. Except in the course of a trial, if a judge speaks to an attorney while the attorney is sitting the attorney should rise to answer the court. The proper way to address the court in the first instance is "May the Court please," not "If the Court please," and these words, of course should be spoken while the lawyer is on his feet.

The judge will try not to tolerate personalities, and to aid in this effort to be abstract and impersonal, the lawyer should address the court in the third person, as "The Court will remember the testimony," not "You will remember, etc.", or "On the 5th instant the Court entered an order," not "On the 5th instant you entered an order." When the judge is on the bench, he should never be addressed as "You".

When the judge invites the lawyers into chambers, the lawyers should stand back and wait for the judge to enter first; and on returning to the court room, the judge should enter the court room first. In chambers, judge and counsel may be as informal as they please, when laymen are not present. Usually they are all good

friends anyway. In chambers a good story often helps negotiations, but if levity becomes loud enough to carry to the court room outside, clients are likely to conclude that their precious rights are being disposed of in a flippant manner.

To the public, the judge is the court, and whether the lawyer may like the judge or not, he is the one who administers what justice there is in the community. The layman is not likely to respect a judge to whom the lawyers show no respect. Whatever, in relation to the public, will affect the judge adversely will also affect the lawyer adversely.

When the judge on the bench begins to speak while a lawyer is speaking, the lawyer should stop immediately, even in the middle of a sentence. Judges, of course, must be convinced. Sometimes a judge must even be induced to change his mind. A lawyer may argue to a judge earnestly and pointedly and with all the force at his command, but to do this it is not necessary to argue in a loud voice nor in an angry tone. Most judges can hear quite well. Argument to a court usually concerns a point of law, and the more effective style is to approach the matter in an abstract way. When the court is listening to argument, he is entitled to the lawyer's whole attention, and the court should not be annoyed by the lawyer turning away from the court and toward the rear of the room, as if the lawyer sought an audience there. Such conduct may impress the layman, but it certainly will not impress the judge who must decide the matter.

A lawyer should not, while wearing an overcoat and rubbers, nor with his hat in his hand, address a court. Take off the rubbers and hang the coat on the rack. Don't throw the coat over a chair at the trial table, nor on the trial table. If no rack is provided, it is the duty of the bar to see that one is provided. The lawyer should not enter the court room, then take off his hat. He should take off his hat and then enter. He should see to it that his client does

likewise, and not wait until the bailiff is obliged to force the issue. He should tell his clients that they cannot read a newspaper nor do knitting nor attend a howling baby while the judge is trying to hold court. The client should not be brought inside the rail unless he has definite business there.

A few whispers in the court room while court is in session are often necessary to a lawyer, but an extended conversation should be carried on outside. Unnecessary conversations with the minute clerk can be very annoying to the court, and may distract that court's attention when a fellow lawyer is trying hard to hold it.

If the bailiff raps for order, the lawyer should not try to show that he has a "drag" by ignoring the order or suggestion of the bailiff, or just because he thinks the judge is too polite to resort to a reprimand. It is a part of the lawyer's duty to help the court maintain order. If the bailiff is offensively officious, as is sometimes the case, take the matter up with the judge in the chambers during a recess.

The attorney who carries inside the rail a cigar or cigarette turned to the palm of his hand, is like the little boy who holds the apple behind him. He is hiding it from no one except himself. If he puts it on the window sill, it is no ornament and will probably mar the wood before he thinks of it again. He probably would not want his friends to think that he could not afford to buy another cigar.

In the southern jurisdictions, it is often very hot in the court rooms in the summer time. In spite of the heat, the attorney should wear some kind of coat if the judge wears one. The bench is higher and hotter than the trial table. Coats should not be left off without the permission of the court.

When before the court, the attorney should not drape himself over the bar nor rest on it with one elbow. If he could see himself from the rear, he would stand on his two feet and act like a lawyer, and not like a barfly.

Brief cases with lugs should not be placed on the trial table, but on the floor, where the lawyer's feet also should rest. The trial table belongs for the moment, to the lawyers who are before the court, and other lawyers should respect their rights.

Lawyers should make a real effort not to interrupt each other in argument. Sometimes an opponent is so vociferous that there is no opportunity to reply, or he deliberately intends, once he has the floor, to take up all the time of the court so that there can be no reply. The temptation is to break into such unnecessarily prolonged discourse, to talk louder than the opponent does, and thereby obtain the attention of the court. This, of course, brings on a bedlam which is no credit to the bar or the bench. When faced with such a circumstance, a decent lawyer is justified in interrupting only long enough to ask the court to assure him that he will have

a turn and an equal opportunity to be heard. Usually this is sufficient and much more effective.

In metropolitan communities, there are so many court rooms that it is difficult for the bar to take effective part in their care. In many communities, however, we find really only one or two court rooms. If such a court room is ugly or dirty, and can be made respectable and cheerful by a reasonable expenditure, it is the duty of the bar to force the custodian to do his duty, or otherwise see to it that the room is presentable even if the bar members have to bear some of the expenses. It is their second home, and they should see that it is a respectable one.

These may appear to be small matters, but together they create the mental picture which is carried in the mind of the public, and they are more important to the standing of the lawyer in the community than many of us realize.

Sex Appeal?

Little signs like this §§ reveal
That law books do have Secs. appeal.
Contributed by Cleveland Smith of the Coronado, California Bar

Cross-Examination

An important issue was up in the courtroom, and in order to save his cause from defeat it was necessary that Lawyer Wilson should discredit the testimony of an aged witness.

"How old are you?" asked the lawyer.

"Seventy-two years," replied the witness.

"Your memory, of course, is not so brilliant and vivid as it was twenty years ago, is it?"

"Oh, I don't know but what it is".

"State some circumstance," pressed the lawyer, "which occurred, say, twenty years ago, and we shall be able to see how well you can remember."

The witness hesitated. Turning to the Court, he exclaimed, "Your Honor, I appeal to you if I am to be interrogated in this insolent manner?"

The judge replied gravely, "Perhaps you had better answer the question." Whereupon the lawyer gleefully stated, "Yes, sir, answer the question."

"Well, sir," said the witness calmly, "if you compel me to do it, I will. About twenty years ago you studied in Judge Brown's office, did you not?"

"That's so," agreed the lawyer.

"Well, sir, I remember your father coming to my office and saying to me, 'Mr. Jones, my son is to be examined tomorrow, and I wish you would lend me twenty-five dollars to buy him a new suit of—' "

"I object!" shouted the lawyer.

"Let the witness proceed," ordered the Court.

"And I remember, also, from that day to this, I have never been repaid that money. That, sir, I remember just as clearly as though it was only yesterday."

"That's all," growled the lawyer.—Sunshine Magazine.

The Agreeable Stranger

By ALFRED MORRISON
Of the Angola, New York Bar
Editor, Justice Court Topics

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IT WAS just the usual speeding case, with nothing notable about it except that the driver was from Chicago, Illinois. The Judge was, as a rule, inclined to be lenient with drivers who were far from home. Being unfamiliar with the road, presumably it was easier for them to err. This logic might not apply to a speeding violation, perhaps; but it is a fact that a man traveling a long distance is inclined to drive faster than he would on a short trip.

In addition to this extenuating circumstance, the defendant himself was a most agreeable fellow, well dressed and well groomed, who frankly admitted his error, and spoke pleasantly to the officer, and treated the Judge with the utmost respect. He pleaded guilty, and was fined $10—about half what he deserved for the speed he was going.

The defendant produced his wallet, and then, with just the right amount of diffidence and hesitation, explained to the Judge that he was on his way home from a long trip, and that he had been obliged to stay longer in New York than he had anticipated. He had no friends nearer than Chicago, and had less than $10 in cash on his person. So would the Judge do him the great kindness to accept his check for the fine?

The Judge could, and did.

Not wishing to mingle money belonging to others with his own, the Judge kept a separate account in the local bank for money coming into his hands as justice of the peace. The check was deposited in this account, and the Judge thought nothing more of it until, a week later, he received the check back from the bank, with a statement that it had been charged to his justice's account. The check was stamped in large black letters "PAYMENT STOPPED."

With the check in his hand, the Judge thought of the agreeable stranger who had given it to him, and of his plausible story. The stranger was well out of harm's way. There was no chance of success for any legal process, civil or criminal. Even if there had been, the Judge was in no mind to acknowledge to the world that he had been taken for $10 by a man he never had seen before. So

he sadly extracted a $10 bill from his wallet, and placed it in the bank-book of the official account, to be deposited on his next trip to the bank. Having accepted the check, he was liable for it to the State of New York.

While he was doing this, in some subconscious way, he began thinking of his maternal grandfather. The old man was born in Germany, and came to America while still a boy, to seek his fortune. He was mostly self-taught after he reached America and always spoke with an accent, which the old man purposely exaggerated when he was in a humorous mood. The Judge remembered him as he had seen him in his own boyhood—a white-haired man with a white beard and rosy cheeks, and merry blue eyes, like Saint Nicholas himself. There were many tales in the family of the old man's courage, his eternal spirit of adventure, his sense of humor. Then the Judge remembered the story.

In the long depression that began in 1873, the farmers had grown rebellious at the prices they had to pay at the local store, while their own produce was selling for almost nothing. So they banded together and formed an association, called the "Farmers' Alliance." Each of them, including the Judge's grandfather, had put in $100 or more, and with this capital they opened a competing store which they all patronized. But their store manager was lazy and inefficient, and his stock was often depleted. Finally the venture had to be abandoned and the concern liquidated. Out of his original investment grandfather had received a check for sixty-six cents.

While grandfather was gazing at this check, just as the Judge had been gazing a short time ago, grandmother had asked him what he was going to do with it. The old man replied: "I'll put it in a picture frame and hang it on the vall, so my children can see vat a fool deir fader vas. Und under it I'll write 'Ve get too soon oldt, and too late schmart.'"

So the Judge framed his check in a neat little picture frame, and hung it on the wall near his desk. And when plausible strangers asked him if he would accept a check, the Judge would point to his picture frame and say: "Sorry. I have a check."

The Common Law and Statutes

"The statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, makes void only that part where the fault is, and preserves the rest."—Twisden, J., in Maleverer v. Redshaw (1669) 1 Mod. 35.

A Lawyer's Duty

It is the duty of parties to give a lawsuit that attention which a prudent man gives to important business.—Varser, J., in McGuire v. Montvale Lumber Co. 190 NC 806, 131 SE 274.

Among the New Decisions

Airplane Accident — *admissibility of investigation reports.* Pekelis v. Transcontinental & Western Air, 187 F2d 122, 23 ALR2d 1349 (1951) US Av 1, was an action for the death of a passenger in an airplane crash in which the crucial issue was whether the crash was attributable to wilful misconduct of defendant's employees predicated on an alleged improper hookup of the altimeter and failure to make required tests by which it would have been discovered, or to mere negligence in operation. It was held by the Second Circuit, in an opinion by Circuit Judge Augustus N. Hand, that a requested instruction that a deliberate purpose not to discharge some duty necessary to safety may constitute wilful misconduct was properly denied; that a letter written by an employee as to the misleading reading of an altimeter in another airplane under similar conditions was admissible, and that reports of an investigation by defendant's employees into the cause of accident were admissible as an adoptive declaration and under the federal business entries statute.

The appended annotation in 23 ALR 2d 1360 considers the application of the general rules governing the admissibility of documentary evidence to the particular fact situation where, in a personal injury or death action arising out of an airplane accident, evidence is offered consisting of reports of investigations of the accident carried out by the owner or operator of the airplane in question, by government officials, or by others.

Appeal — *effect of voluntary nonsuit.* The recovery of actual and punitive damages for destruction of plaintiff's automobile by defendant's train at a railroad crossing was sought in Allen v. Atlanta & Charlotte Air Line Railway Co., 216 SC 188, 57 SE 2d 249, 23 ALR2d 657. Upon direction of a verdict for the defendant as to punitive damages, the plaintiff took a voluntary nonsuit. An appeal from the ruling as to punitive damages was dismissed by the Supreme Court of South Carolina which, in an opinion by Justice Taylor, held that the right to recover punitive damages, though in a

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sense an independent cause of action, is dependent to the extent that a verdict for actual damages is essential to the recovery of punitive damages, and that the act of the plaintiff, in taking a voluntary nonsuit, terminated the action and left nothing upon which to appeal.

The appended annotation in 23 ALR 2d 664 discusses "Appellate review at instance of plaintiff who has requested, induced, or consented to dismissal or nonsuit."

Automobile Insurance — *collision damage.* The automobile of the plaintiff in Bruener v. Twin City Fire Insurance Co., 37 Wash2d 181, 222 P2d 833, 23 ALR2d 385, skidded on an icy pavement, left the pavement, and struck an embankment. The plaintiff sued to recover from the defendant insurance company for the amount of damage to the car. The comprehensive clause of the policy excepted loss caused by collision of the automobile with another object. The lower court granted judgment for the plaintiff and the defendant appealed.

The Supreme Court of Washington, in Banc, in an opinion by Justice Mallery, reversed the judgment of the lower court and held that the collision of the plaintiff's automobile with the embankment was within the exception in the comprehensive clause and that the damage to the car was caused by the collision and not the skidding.

The appended annotation in 23 ALR 2d 389 discusses "Recovery under automobile property damage policy expressly including or excluding collision damage, where vehicle strikes embankment, abutment, roadbed, or other part of highway."

Automobile Steering Mechanism — *defect in.* Damages for death resulting from a collision of an automobile driven by the decedent and a truck owned by one defendant and driven by the other were sought in Interstate Veneer Co. v. Edwards, 191 Va 107, 60 SE2d 4, 23 ALR2d 532. The decedent's absence of fault was conceded. It appeared in evidence that the right wheels of defendants' truck went off the traveled portion of the highway and then sharply to the left across the highway into the decedent's oncoming car.

Judgment on a verdict for the plaintiff was affirmed by the Supreme Court of Appeals of Virginia which, in an opinion by Justice Buchanan, held that the prima facie case made by evidence of defendant-driver's excessive speed and failure to stay on the right side of the road required defendants to advance a reasonable explanation tending to show that the injury was due to something other than defendant-driver's negligence; and that the evidence as a whole was sufficient to sustain jury's finding that plaintiff's prima facie case was not overbalanced or left in doubt by the evidence in support of defendant's explanation that the mishap was due to a breakdown of the car's steering mechanism.

The subject of the appended annotation in 23 ALR2d 539 is "Liability of

owner or operator of motor vehicle for accident resulting from alleged breaking of or defect in steering mechanism."

Claim against municipality — *notice.* Damages for personal injuries sustained in falling on a sidewalk were sought in Fisher v. Denver, — Colo —, 225 P2d 828, 23 ALR2d 963, against the defendant city and county. Defendant's charter provided: "Before the city and county shall be liable, . . . the person so injured . . . shall, within sixty days after receiving such injuries, give the mayor notice in writing of such injuries." Plaintiff's notice was directed to and served upon the city clerk. The complaint and summons in an earlier action against the city, voluntarily dismissed without prejudice, were also served upon the city clerk, and the city filed an answer thereto. Notice of plaintiff's claim did not appear to have been brought, within the required period, to the attention of the mayor or city council.

A judgment entered upon granting defendant's motion to dismiss the action was affirmed by the Supreme Court of Colorado, in Banc, in an opinion by Justice Alter, which held that the charter provision was mandatory; that the mayor did not have power to appoint the municipal clerk as agent for receipt of such notices, or to waive the charter requirements; and that the notice directed to and served upon the municipal clerk, and the complaint, summons, and answer in the earlier action, were ineffectual.

The "Persons upon whom notice of injury or claim against municipal corporation may or must be served" is the subject discussed in the appended annotation in 23 ALR2d 969.

Damage by Water — *from excavation.* Damages caused by water escaping from defendant's land to the cellar of plaintiff's adjoining building were sought in Brown v. Gessler, — Or —, 230 P2d 541, 23 ALR2d 815. Defendant had permitted the water to accumulate in a temporary excavation made by him on his land in the ordinary course of building construction operations. The usual heavy rainfall in the territory and period involved was a matter of common knowledge.

Judgment on a verdict for the plaintiff was affirmed by the Supreme Court of Oregon which, in an opinion by Justice Tooze, held that the doctrine imposing liability without fault upon an adjoining landowner is applicable only where the substance likely to do mischief upon escape is brought to his land for his own purposes, and is not applicable to water accumulating through natural causes in a temporary excavation made in the course of building construction operations, and that the trial court correctly submitted to the jury only the cause of action based on negligence.

The appended annotation in 23 ALR 2d 827 discusses the applicability to the overflow or escape of water from an excavation made in the course of construction operations of the rule of absolute liability laid down in Rylands v. Fletcher.

Duty of Lessee — *to remove property, installations, etc.* A lessor of property for use as a tank and pump station sought in Duvanel v. Sinclair Refining Co., 170 Kan 483, 227 P2d 88, 23 ALR2d 649, action against the lessee, to recover damages for failure, upon termination of the lease, to return the premises in its original condition. The lessee had, without negligence, effected a partial removal of his installations, leaving upon the property pipelines, concrete sidewalks and foundations for pumps, garages, and dwelling houses, and the like, and thereby rendering the property unfit for normal use without the expenditure of large sums of money. Surrender of the premises in its original condition was not required by express provision of the lease which granted the lessee the right to make the installations and to remove them within thirty days after termination thereof.

A ruling sustaining defendant's demurrer to the complaint because of its failure to state a cause of action was approved by the Supreme Court of Kansas, which, in an opinion by Justice Price, held that the lessee was not, under the terms of the lease, subject to the implied duty of removing the installations.

The appended annotation in 23 ALR 2d 655 discusses the "Implied duty of lessee to remove his property, debris, buildings, improvements, and the like, from leased premises at expiration of lease."

"Your uncle died leaving a debt of fifty dollars, and he'd appreciate it if you all chip in and pay it."

Estate Tax — *valuation of corporate stock.* Objections to a valuation placed by appraisers, for inheritance tax purposes, upon a large block of corporate stock were filed in State v. Wagner, 233 Minn 241, 46 NW2d 676, 23 ALR2d 762, by the state commissioner of taxation. The stock was that of a closely held corporation of which the decedent's shares represented 23.29, and the residuary legatee's own shares represented 43.86, per cent of the total number of outstanding shares. The average daily trading in the stock was small in comparison with the total number of outstanding shares. The applicable statute provided for appraisal of the inheritance at its "full and true value."

An appraisal by the trial court was affirmed by the Supreme Court of Minnesota which, in an opinion by Chief Justice Loring, rejected the attempt of the executors to have the appraisal tested, under the "blockage" theory, by the amount which would be realized from the sale of a large block of stock in a market depressed by such large offering, or by the price which would be paid for the stock by a wholesale dealer, or by taking into consideration the expenses involved in marketing the stock so as to avoid the depression in price. The statutory term "full and true value" was held not to have been intended to mean "market value" in cases where no standardized market for the particular kind and quantity of property was shown to exist, but to mean a fair value to be determined by reference to all the relevant facts in evidence.

The subject of the appended annotation in 23 ALR2d 775 is "Valuation of corporate stock for purposes of succession, inheritance, or estate tax, as affected by quantity involved."

Estoppel — *of governmental body.* Daniell v. Sherrill, (Fla) 48 So2d 736, 23 ALR2d 1410, was suit to quiet title, brought by an agency of the state against claimants under state tax deeds. The property had been owned by the United States and the invalidity of the tax deeds was conceded. Possession and improvement of the property under the tax deeds for a period of more than fifty years were acquiesced in by the state which, during such period, collected taxes levied and assessed upon the property. Subsequently the state recognized the title of the United States and ceded to it exclusive jurisdiction over the property without offering any refund to the tax deed claimants. The state later acquired the property from the United States for park purposes.

A decree quieting title in the plaintiff and dismissing all counterclaims was reversed by the Supreme Court of Florida, en Banc, in an opinion by Associate Justice Simpson, which held that the state, invoking the jurisdiction of the court, was subject to the maxim, "he who seeks equity must do equity," and to the technical or legal estoppel by deed, as well as to an equitable estoppel arising from the circumstances above set forth.

The appended annotation in 23 ALR 2d 1419 is concerned with the question whether the United States, a state, or a political subdivision of a state can be estopped by its deed or other written instrument to deny matters therein recited.

Felony Verdict — *absence of accused.* In Commonwealth ex rel. Milewski v. Ashe, 363 Pa 596, 70 A2d 625, 23 ALR2d 449, the relator filed a petition for a writ of habeas corpus on the ground that he was in jail and not in court when the jury returned a verdict convicting him of assault and battery with intent to rob, a felony. The lower court refused the writ and the relator appealed.

The Supreme Court of Pennsylvania, in an opinion by Chief Justice Maxey, reversed the judgment denying a writ of habeas corpus and held that the defendant had the right to be in court and that in felony cases a defendant in custody must be brought into court when the verdict is returned.

The extensive appended annotation in 23 ALR2d 456 collates the American cases involving the absence of the accused at the rendition of the verdict in a felony case. It includes the question of whether or not the record must show the presence of the defendant at such time and the sufficiency of the record in this regard.

Fidelity Bond — *failure or delay of notice of loss.* Hartford Accident & Indemnity Co. v. Hattiesburg Hardware Stores, — Miss —, 49 So2d 813, 23 ALR2d 1053, was an action on a fidelity bond covering the general manager of a butane gas company. The bond required notice to the insurer within fifteen days after discovery of the fraud, and itemized proofs of loss within four months thereafter. On December 20, 1947, an employee of the company reported a shortage in the gas storage tanks. An investigation was started, and apparent irregularities were shown by evidence of a more or less inconclusive nature. On January 7, 1948, the general manager was discharged. Further investigations were undertaken; the insurer was notified; and on or about May 1, 1948, itemized proofs of loss were filed. The insurer's auditor assisted in the investigations.

The principal question was whether the notice and proofs of loss had been filed in time. On this issue the Mississippi Supreme Court (Div. A) held: (1) failure to file respectively within fifteen days and four months, after December 20, 1947, was not fatal, since at that time there was a mere suspicion of defalcation, and actual knowledge thereof was not established until much later, and (2) even if the notice and proofs had not been filed in time, this did not preclude recovery, since time was not of the essence of the contract, and there was no showing that the insurer had been prejudiced. The opinion was written by Kyle, J.

The "Effect of failure to give notice, or delay in giving notice or filing of proofs of loss, upon fidelity bond or insurance" is discussed in the appended annotation in 23 ALR2d 1065.

Gift of Stock — *necessity of delivery of certificate.* Recovery of a stock certificate was sought in Lyons v. Freshman, — Mont —, 226 P2d 775, 23 ALR2d 1165, by the personal representative of a husband against the personal representative of the wife, both of whom were killed in an automobile accident. The shares of stock were originally owned by the wife. In a safety deposit box owned jointly by them and equally accessible to each were found, along with other papers and securities belonging to each, the unindorsed stock certificate and a separate instrument, signed by the wife, of assignment of the shares to the husband.

Judgment for the plaintiff was reversed by the Supreme Court of Montana which, in an opinion by Justice Metcalf, held that a valid gift under the Uniform Stock Transfer Act required delivery of the unindorsed stock certificate, as well as the separate instrument of assignment; that the burden of proof of such delivery was on the plaintiff; and that, since presence of the certificate in the safety deposit box was as consistent with ownership and possession of the wife as with that of the husband, there was no evidence whatsoever relative to delivery of the certificate.

The appended annotation in 23 ALR 2d 1171, which supersedes one earlier annotation on the point and supplements another, covers the later deci-

"I wish to file a complaint. A man was about to annoy me, and one of your officers drove him away!"

sions dealing with the necessity of delivery of the stock certificate to complete a valid gift of stock.

Hunting Accident — *criminal responsibility for.* A conviction of manslaughter in shooting another while hunting through mistaking him for an animal was held in State v. Green, 38 Wash2d 240, 229 P2d 318, 23 ALR2d 1397, to have been warranted by evidence; and a third person's declarations were held admissible as part of the res gestae. Justice Mallery wrote the opinion of the Washington Supreme Court.

The appended annotation in 23 ALR 2d 1401 is concerned with the question of whether criminal responsibility is imposed, and the nature of criminal responsibility which may be imposed, in cases of death or injury resulting from hunting accidents.

Income Tax — *nontrade or nonbusiness expense.* Review of a finding of a deficiency in the petitioner's income tax return was sought in Addison v. Commissioner, 177 F2d 521, 23 ALR2d 897. The item disallowed as "ordinary and necessary expenses . . . for the management, conservation, or maintenance of property held for the production of income" [Internal Revenue Code 26 USC § 23 (a) (2)] consisted of expenses incurred in successfully defending an action brought to set aside, on the ground of fraud and undue influence, certain income-producing gifts to the petitioner.

A decision sustaining the finding of deficiency was affirmed by the Eighth Circuit, in an opinion by Chief Justice Gardner, which held that the acti involved primarily title to propert and that the expenses incurred in d fending the same were capital expend tures not deductible from gross income

The "Deduction of cost of acquirin protecting, or disposing of title to i come-producing property as a nontra or nonbusiness expense" is the subj discussed in the appended annotati in 23 ALR2d 902.

Insurance — *risks common, or n common, to both sexes.* In Crism v. Fidelity Health & Accident Mut Insurance Co., 87 Ohio App 467, NE2d 776, 23 ALR2d 1016, an acti based on the removal of a uterus which a benign fibroid tumor had veloped, was brought by the insu under a health and accident policy, cluding indemnity for hospital, medic and surgical expenses. The policy p vided: "No benefits shall be paya in the event of . . . disability cau by, contributed to, or affecting org not common to both sexes." It peared in evidence that fibroid tum affect organs of both sexes.

Judgment for the plaintiff was versed by the Court of Appeals of Oh Lucas County, in an opinion by Just Carpenter, which held recovery p cluded by the contractual exclusion a disability affecting organs not co mon to both sexes.

The appended annotation in 23 A 2d 1021, superseding an earlier on the same subject, collects to date cases construing insurance policy p visions where an attempted exclu

or limitation of liability is framed around some such phraseology as diseases, disability, or organs "common" or "not common" to both sexes, or "peculiar" to one sex.

Life or Accident Insurance — *violation of law by insured.* The Massachusetts Supreme Judicial Court, in an opinion by Justice Lummus, held in Molloy v. John Hancock Mutual Life Insurance Co., — Mass —, 97 NE2d 422, 23 ALR2d 1103, that it is against public policy to allow recovery on a life insurance policy, even by an innocent beneficiary, where the death of the insured is the result of his own criminal conduct, as where he is shot and killed while robbing a store.

The question considered in the appended annotation in 23 ALR2d 1105 is the liability of an insurance company under a life or accident policy containing no express condition limiting or excluding liability for injury or death resulting from the insured's criminal act, where, as a matter of fact, the event relied upon as maturing the claim on the policy did so result. The annotation supersedes an earlier one on the same subject.

Literary and Artistic Property Rights — *in motion pictures, radio, television.* Recovery was sought in Stanley v. Columbia Broadcasting System, 35 Cal2d 653, 221 P2d 73, 23 ALR2d 216, for infringement by defendant radio broadcasting company of an uncopyrighted plan for a radio program claimed to have been originated by plaintiff. Plaintiff's program, recorded for presentation to prospective licensees or purchasers, had been submitted to, and considered by, defendant on various occasions under circumstances indicating an expectation of compensation for use of the idea. The proposed plan consisted of a theater-of-the-air type of program, in which plays intended for motion-picture use were adapted for radio presentation, and in which the salient feature was listening audience participation in determination of the suitability of the play for motion-picture production and selection of motion-picture stars to be featured therein. Defendant's program, claimed to be an infringement, consisted of the presentation of a preview radio broadcast of a motion picture scheduled for production, a gathering of written comments of the studio audience on the merits of the play and the stars to be featured therein, and prizes to be given to the listening audience for best letters relating to the program.

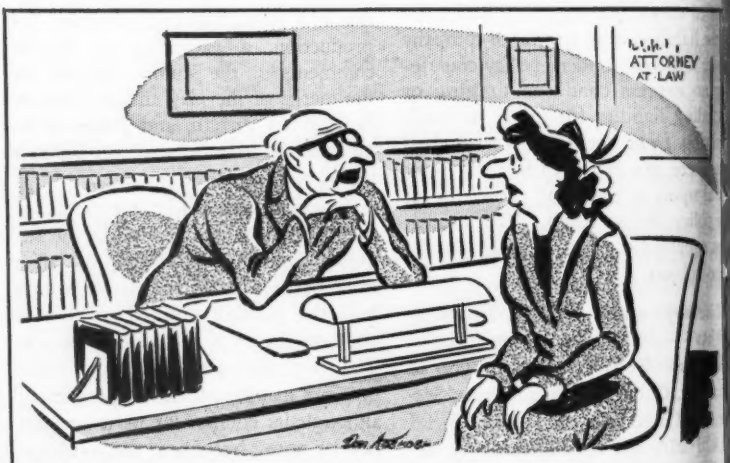
Judgment on a verdict for the plaintiff for $35,000 was affirmed by the Supreme Court of California, in Banc, in an opinion by Justice Carter, which held the plaintiff entitled to recover upon the theory of an implied contract. The court ruled that an idea for a radio program may be entitled to protection, although its component parts are not new or novel, but where the combination thereof is new or novel; and that the program was not made public property by the limited publication consist-

ing of an audition recording before an audience in a broadcasting studio. The originality of plaintiff's program idea, the defendant's access thereto, and the similarity of the two programs, were held to be questions of fact for the jury.

The extensive appended annotation in 23 ALR2d 244 discusses exhaustively the existence and nature of literary and artistic rights for the purposes of motion pictures, radio, and television, and also their infringment by or in connection with such media.

Mandamus — *to compel grant of bail.* In State ex rel. Burford v. McKee, — W Va —, 62 SE2d 281, 23 ALR2d 798, an original mandamus proceeding was instituted to compel the acceptance of bail in a case in which the petitioner had been convicted of a felony. It appeared that a bail bond previously given by petitioner had been forfeited and remained uncollected, and that petitioner had previously been convicted of two other felonies one of which was committed while defendant was at large on bail for the instant offense, and for which he was under parole from the sentence imposed.

In an opinion by Justice Given, the Supreme Court of Appeals of West Virginia denied the writ and held that denial of the bail was not an abuse of the trial court's discretion the manner of exercise of which, as distinguished



"Your husband definitely CAN NOT fire you. You're entitled to a legal divorce and alimony."

from the failure to adhere to a clear legal duty in the matter of bail, would not be controlled by mandamus.

The appended annotation in 23 ALR 2d 803 discusses "Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties."

National Labor Relations Board — *jurisdiction.* Enforcement of an order of the National Labor Relations Board was sought by the board in National Labor Relations Board v. Shawnee Mill Co., 184 F2d 57, 23 ALR 2d 886, against a milling company which operated several plants as separate units in different cities. The order related to a labor dispute in a unit engaged in purely intrastate operations. The manager of such unit had complete control of its activities, subject only to over-all supervision as to policies, including labor policies. Other units of the milling company were engaged in interstate commerce.

Enforcement of the order was denied by the Tenth Circuit, in an opinion by Circuit Judge Huxman, which, distinguishing cases in which the separate plants were integrated parts of a general operation, held that the common ownership did not subject the instant intrastate operation to jurisdiction of the National Labor Relations Board.

The appended annotation in 23 ALR 2d 893 deals with the "Jurisdiction of National Labor Relations Board over branch plant or separate department engaged in intrastate operations, where owner is engaged in interstate commerce in other plants or departments."

Oil and Gas Tanks, Pipes, etc.— *as attractive nuisance.* In Stanolind Oil & Gas Co. v. Jamison, 204 Okla. 93, 227 P2d 404, 23 ALR2d 1141, action for the wrongful death of an eight-year-old child was based on the attractive nuisance doctrine. The child lived on a tract a part of which was occupied by defendant's oil tanks which were ordinary oil field appliances in common use but were the only ones in the neighborhood where the child lived. The child and her brother frequently played near the tanks, and on several occasions were seen on a catwalk near the top of a tank, and had in fact been taken up a stairway leading thereto by an employee of defendant to view the multicolored oil through a vent in the tank. On the occasion of her death, the child was found asphyxiated by gas with her face in the vent. No warning had been given of the inherent danger involved.

Judgment on a verdict for the plaintiff was affirmed by the Supreme Court of Oklahoma which, in an opinion by Justice Luttrell, held that the circumstances above stated presented questions of fact properly presented to the jury whose findings were sustained by sufficient evidence.

The appended annotation in 23 ALR 2d 1157 examines the cases dealing with the application of the attractive nuisance doctrine to oil and gas tanks, pipes and pipelines, and apparatus and equipment thereof. Gasoline tanks and pipelines have been included, but not tanks constituting parts of vehicles.

Phonograph, Loud-Speaker, or Other Broadcasting Device — *as nuisance.* Clinic & Hospital v. McConnell, — Mo App —, 236 SW2d 384, 23 ALR2d 1278, was an action by a hospital to enjoin the operation of a loud-speaker in the front window of a music store diagonally across the street. The hospital had been erected in the business district many years before; the music store had been in operation for only a year or so. Music was continuously broadcast through the speaker all day, and sometimes until as late as eleven o'clock at night. It was distinctly audible in the hospital above the usual street noises. The evidence showed that it had an injurious effect on the patients, retarding their recovery and causing some to leave the hospital. The defendant had refused to discontinue the operation of the speaker, or even to tune it down except temporarily.

It was held by the Kansas City Court of Appeals that the injunction should be granted. The operation of the speaker was held under the circumstances to be an unusual and unreasonable use of the defendant's property, against which a private person injured thereby, particularly such a social institution as a hospital, ought to be entitled to relief. Commissioner Bour wrote the opinion.

The "Use of phonograph, loud-speaker, or other mechanical or electrical device for broadcasting music, advertising, or sales talk from business premises, as nuisance" is the subject of the annotation in 23 ALR2d 1289.

Receiver — *in dissolution of partnership.* In McKinley v. Long, 227 Ind 639, 88 NE2d 382, 23 ALR2d 577, an action by a partner for an accounting after the dissolution of a partnership, the evidence showed that the articles of partnership did not provide for any winding up or liquidating procedure, there were numerous dissensions between the partners, and the firm assets were in danger of loss because of such dissensions. The court appointed a receiver by interlocutory order and the defendant appealed from this appointment.

The Supreme Court of Indiana, in an opinion by Justice Emmert, affirmed the order appointing the receiver and held that the appointment was proper under the circumstances.

An exhaustive discussion of "Appointment of receiver in proceedings arising out of dissolution of partnership or joint adventure, otherwise than by death of partner or at instance of creditor" is contained in the extensive appended annotation in 23 ALR2d 583.

Recorded Deed — *personal covenant in.* The owner of a store in which groceries and soft drinks were sold conveyed two lots a short distance away by a deed which contained the condition that neither the grantees nor their assigns should sell groceries or bottled drinks in any building to be erected on the lots. After this deed was recorded, the original grantees deeded the two lots to another who in turn leased the premises. The lessee used a building on the premises for

the sale of groceries and soft drinks. In Oliver v. Hewitt, 191 Va 163, 60 SE2d 1, 23 ALR2d 516, the original grantor sought injunctive relief and appealed after the lower court's decree denied the relief sought.

The Supreme Court of Appeals of Virginia, in an opinion by Justice Miller, reversed the lower court's decree and held that since a personal restrictive covenant is enforceable against those taking with at least constructive notice of the covenant and since the recording of the deed imparted constructive notice of the covenant to the original grantee's successor and her lessee, the appellant was entitled to an injunction so long as he conducted his store for the sale of groceries and soft drinks.

"Personal covenant in recorded deed as enforceable against grantee's lessee or successor" is the subject of the appended annotation in 23 ALR2d 520.

Res Judicata — *same accident, new party.* In Ball v. Benjamin, 313 Ky 623, 233 SW2d 267, 23 ALR2d 707, damages for personal injuries sustained in a collision of automobiles were sought in actions by passengers of one of the cars against the driver of the other. The plaintiffs were riding in a car driven by their brother and owned by their father. In previous actions judgments had been rendered against the father in favor of the defendant for damage to the latter's car and in favor of the defendant's passenger-wife for personal injuries.

"Miss Flibb, why do you have to take two hours for lunch when you're reducing?"

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A judgment sustaining pleas in abatement and dismissing the actions was reversed by the Court of Appeals of Kentucky which, in an opinion by Justice Helm, held that the plaintiffs in the instant actions who were not parties to the previous actions, or witnesses therein, or principals or agents of the parties thereto, were not concluded by the judgments rendered therein.

The subject of the appended annotation in 23 ALR2d 710 is "Judgment in action growing out of accident as res judicata, as to negligence or contributory negligence, in later action growing out of same accident by or against one not a party to earlier action."

Restrictive Covenants — *as affecting walls, fences, etc.* Davis v. Huguenor, 408 Ill 468, 97 NE2d 295, 23 ALR2d 931, was an action in equity in which removal of a fence on defendant's property, a vacant lot in a subdivision of quality residences, was sought. Before subdivision of the property, the original owner recorded a declaration specifically referring to a previously recorded plat and containing a restrictive covenant against the construction of fences or planting of hedges forward of the front elevation of any house except on two designated streets. The south side of defendant's lot was bounded by an excepted street, and the east side by a restricted street; the fence was constructed along the east and north sides. Defendant's deed was expressly made subject to restrictions and easements of record and provided for beautification of the property in keeping with the general landscaping of the subdivision.

A decree against defendant was affirmed by the Supreme Court of Illinois in an opinion by Justice Thompson, which, ruling that the decree was not so manifestly against the weight of the evidence as to justify a reversal, held that the restrictive covenant was valid and binding upon the defendant, and was violated by the fence although it was an ornamental one constructed on a vacant lot bounded on one side by an excepted street.

The appended annotation in 23 ALR 2d 937 discusses the validity, construction, and application of restrictive covenants expressly forbidding, limiting, regulating, or permitting (as exceptions to other restrictions) fences, hedges, or walls, and with the applicability to fences, hedges, or walls similar to fences, of restrictive covenants not specifying such structures or improvements but sought to be applied to them.

Riparian Owner — *right to construct dikes, etc.* Damages for the erosion or washing away of a large area of land bordering a stream were sought in Sinclair Prairie Oil Co. v. Fleming, 203 Okla 600, 225 P2d 348, 23 ALR2d 741, by the owner against the owners of land on the opposite side. The latter, in an area of their land washed out by a previous flood, had erected a fence of a height no greater than the bank in its original condition. Sand and silt deposited by the waters

on the fence extended into the original channel so as to form a bar causing injury to the opposite bank.

Judgment on a verdict for the plaintiff was reversed by the Supreme Court of Oklahoma, in an opinion by Justice Welch, which, distinguishing cases wherein the injury was caused by an obstruction placed above the ground in its natural state, held that a fence within the washed-out area of no greater effect on the stream than a full restoration of the washed land does not give rise to a cause of action for injuries to the opposite bank.

The "Right of riparian owner to construct dikes, embankments, or other structures necessary to maintain or restore bank of stream or to prevent flood" is discussed in the appended annotation in 23 ALR2d 750.

Statute of Frauds — *description of land.* The plaintiff sued in Martin v. Seigel, 35 Wash2d 223, 212 P2d 107, 23 ALR2d 1, for specific performance of a contract to sell real property. The contract was represented by an earnest-money agreement in which the realty to be sold was described merely by street number, city, county, and state. The lower court held that this description was insufficient under the statute of frauds and the plaintiff appealed from the decree dismissing the action.

The Supreme Court of Washington, in an opinion by Justice Schwellenbach, affirmed the decision of the lower court and held that in the state of Washington, platted real property contracted to be sold or conveyed must be described by the correct lot number, block number, addition, city, county, and state.

The extensive appended annotation in 23 ALR2d 6 contains an exhaustive discussion of "Sufficiency of description or designation of land in contract or memorandum of sale, under statute of frauds."

Statute of Frauds — *sale of land, statement of consideration.* In a counterclaim to a bill for partition of real estate, the defendants in Hanlon v. Hayes, 404 Ill 362, 89 NE2d 51, 23 ALR2d 154, sought specific performance of a contract for sale by the plaintiffs to defendants of their interests therein. By their reply, the plaintiffs set up the statute of frauds in that the written contract relied upon did not, at the time of the signing thereof, contain a statement as to the price agreed upon for the sale. The statute of frauds contained a provision that "the consideration of any such promise or agreement need not be set forth or expressed in the writing."

Dismissal of the counterclaim and entry of a decree for partition were affirmed by the Supreme Court of Illinois in an opinion by Justice Gunn, which, reviewing the historical background of the statute of frauds, held that the "promise" or "agreement" in the provision above referred to applied to the section dealing with personal actions in which such terms were used, and not to the section dealing with an "action . . . upon any contract for the sale of lands"; and that the counter-

claim was not maintainable because of the absence of a statement in the written agreement of the consideration agreed upon.

The extensive appended annotation in 23 ALR2d 164 discusses "Necessity and sufficiency of statement of consideration in contract or memorandum of sale of land, under statute of frauds."

Subpoena Duces Tecum — *form, etc., for production of corporate records.* Ex parte Monroe County Bank, 254 Ala 515, 49 So2d 161, 23 ALR2d 856, involved a situation in which the complainant in a divorce suit made application and was granted the right to examine witnesses to perpetuate their testimony. One of the witnesses to be thus examined was a bank president and, prior to the hearing, a subpoena duces tecum was issued to the bank and served on him. The bank filed an appearance in the proceeding by way of answer or reply to the subpoena duces tecum and objected to complying with the subpoena duces tecum. The complainant moved to compel the bank to produce the documents at or before the taking of the testimony of the bank president and the court accordingly ordered the bank to produce the following documents relating to certain named individuals and companies: deposit and withdrawal records; loan records; canceled checks; financial statements; United States bond purchase and sale records;

"They voted me a junior partner this morning. I learned how to pronounce 'hereditaments and appurtenances'."

and safe-deposit box records. The bank petitioned for a writ of mandamus to require the judge of the circuit court to vacate the order requiring the production of the documents.

The Supreme Court of Alabama, in an opinion by Justice Foster, denied the writ and held that the subpoena duces tecum was properly directed to the banking corporation and that although the subpoena duces tecum was very broad, the bank could and should comply with it in the manner indicated by the court.

The "Form, particularity, and manner of designation required in subpoena duces tecum for production of corporate books, records, and documents" is the subject discussed in 23 ALR2d 862.

Tire Tracks or Marks — *evidence of.* In Williams v. Graff, — Md —, 71 A2d 450, 23 ALR2d 106, the plaintiff, a garbage collector, sustained personal injuries while crossing a highway, as a result of being struck by a taxicab owned by the defendant. At the trial, a county police officer, who investigated the accident promptly after it happened but who arrived at the scene after the taxicab had left, was called by the plaintiff and testified on direct examination as to his observations at the scene of the accident, including the observation of a pool of blood on the road. On cross-examination the investigating officer testified as to skid marks on the road. The plaintiff moved to strike out the testimony as to the skid marks and this motion was overruled. After a verdict for the defendant, the plaintiff appealed.

The Court of Appeals of Maryland, in an opinion by Justice Delaplaine, affirmed the judgment for the defendant and held that the cross-examination as to the skid marks observed by the witness was proper and that the testimony as to the skid marks was properly admissible in evidence.

The annotation in 23 ALR2d 112 entitled "Admissibility of evidence as to tire tracks or marks on or near highway" supersedes an earlier annotation on this interesting and practical question.

Truth and Deception Tests — *admissibility in evidence.* In Henderson v. State, — Okla Crim —, 230 P2d 495, 23 ALR2d 1292, a prosecution for rape, a verdict of guilty and death as the penalty was returned by the jury. It appeared that, upon the trial, defendant's attempts to show that lie detector and truth serum tests were made and were negative were rejected; the victim, upon her cross-examination, showed a lack of conviction of identification of the defendant; and an assault of another woman by defendant disclosed upon her cross-examination by defendant's counsel, was amplified by the prosecuting attorney on redirect examination without objection by defendant.

Judgment entered on the verdict was modified so as to reduce the penalty from death to a definite term of years, and, as so modified, was affirmed by the Criminal Court of Appeals of Okla

homa which, in an opinion by Presiding Justice Brett, held that lie detector and truth serum tests have not gained that standing and scientific recognition, or demonstrated that degree of dependability, as to justify their use in a criminal trial; and that the evidence, though sufficient to sustain the conviction, did not reach that high degree of moral certainty required to warrant the death penalty, particularly in view of the uncertainty of identification and the prejudicial effect of the introduction in evidence of the unrelated assault.

The appended annotation in 23 ALR 2d 1306, superseding a series of earlier annotations on the question, concerns itself with the admissibility in evidence of the results of various physiological and psychological tests designed to determine scientifically the truth or falsity of oral statements or testimony. To date, the courts have passed on the admissibility of the results of lie detector, truth serum, and hypnosis tests.

Warehouseman — *limitations governing damage action against.* The appropriate statute of limitations to be applied was involved in Utah Poultry & Farmers Co-operative v. Utah Ice & Storage Co., 187 F2d 652, 23 ALR2d 1461, action to recover damages for the deterioration of a large quantity of eggs stored in defendant's warehouse. A three-year period was provided for actions "for taking, detaining or injuring personal property," and a six-year period for actions "upon any contract, obligation or liability founded upon an instrument in writing." The

"Miss Crimins, drop whatever you're doing and come here a minute."

warehouse receipt expressly limited the defendant's liability to the "reasonable care and diligence required by law."

A summary judgment for defendant on the ground that the action was barred by the three-year statute of limitations was affirmed by the Tenth Circuit, in an opinion by Circuit Judge Murrah, which held that that statute was applicable to all actions for injuries to personal property whether relief was sought on a tort or breach of contract theory; but that, even if applicable to actions ex delicto exclusively, would govern the case sub judice since the warehouse receipt created no duty beyond that imposed by statute so that the action was for violation of a statutory duty.

The appended annotation in 23 ALR 2d 1466 discusses "Statute of limitations governing damage action against warehouseman for loss of or damage to stored goods."

Government Control

We're agin' the proposal that the Government control the weather. The weather is bad enough as it is, without its falling in the hands of bureaucrats.—Cincinnati Enquirer.

Another Tax?

"And now, gentlemen," continued the congressman, "I wish to tax your memory."

"Good heavens," muttered a colleague, "why haven't we thought of that before."—Tax Topics.

Too True

One trouble with this country is the number of people who are trying to get something for nothing. Another trouble is the high percentage of those who succeed.—Arkansas Baptist.

Good Law?

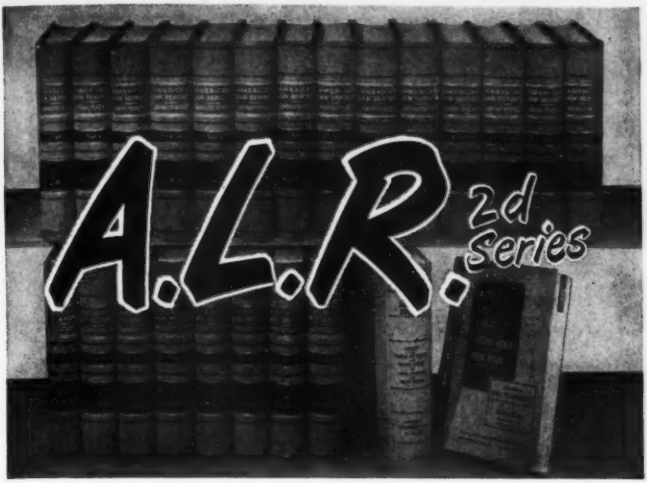
A man, after having been beaten up by his wife, was refused a divorce, the judge ruling: "Slight acts of violence by the wife from which the husband can easily protect himself do not constitute cruelty."—Briggs Assembler.

Presence of Mind

He was a very absent-minded lawyer. When he began to plead the cause of his client the defendant, he said: "I know the prisoner at the bar. He bears the reputation of being the most consummate, impudent scoundrel in the county. . . ."

There was a flurry in the courtroom, and the lawyer's partner hurried over and whispered, "Sh-h-h, Tom. It's your client you're speaking of."

Immediately the attorney continued . . . "but what great and good man ever lived who was not slandered and calumniated by many of his contemporaries?"—Tracks.



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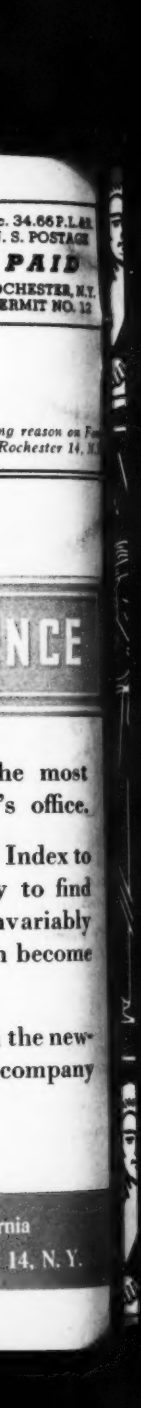
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